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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1978

No. 78-327

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

JESSE W., a Minor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of California

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Topical Index

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement of the case	3
Reasons for granting the writ	4
Argument	4
The California Supreme Court erred in holding that a juvenile court judge may not reconsider the determination of a referee that a juvenile did not commit a delinquent act	4
Conclusion	10

Table of Authorities Cited

Cases	Pages
Arizona v. Washington, 46 U.S.L.W. 4127 (1978)	7
Burks v. United States, 46 U.S.L.W. 4632 (1978)	6, 8
Dorchy v. Kansas, 264 U.S. 286 (1924)	9
Green v. United States, 355 U.S. 184 (1957)	7
In re Edgar M., 14 Cal.3d 727, 537 P.2d 406, 122 Cal.Rptr. 574 (1975)	5, 9
Swisher v. Brady, 46 U.S.L.W. 4880 (1978)	4, 5, 6, 7, 8, 9

Codes

California Code of Civil Procedure, Section 1102	3
California Penal Code, Section 242	3
California Welfare and Institutions Code:	
Section 18	8
Section 253	8
Section 254	8
Section 559	3, 8, 9
Section 560	8
Section 602	3, 5

Constitutions

United States Constitution:	
Fifth Amendment	4, 5
Fourteenth Amendment	4
California Constitution, article IX, Section 22	5, 8, 9

Rules

Maryland Rules of Procedure, Rule 911	6

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The petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of California entered in this proceeding on May 30, 1978.

OPINION BELOW

The opinion of the Supreme Court of California, which may be found at 20 Cal.3d 893, 576 P.2d 963, 145 Cal.Rptr. 1, *as modified,* 21 Cal.3d 512b, ... P.2d ....., ... Cal.Rptr. ..... (1978), appears as Appendix A

to this petition. The vacated opinion of the California Court of Appeal, First Appellate District, Division One, reported at 133 Cal.Rptr. 870 (1976), appears as Appendix B to this petition.

JURISDICTION

The judgment of the Supreme Court of California was entered on May 30, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the grant of a rehearing by a juvenile court judge of a referee's determination that a juvenile did not commit a delinquent act would violate the constitutional prohibition against double jeopardy.

STATUTES INVOLVED

1. Former California Welfare and Institutions Code section 559 (presently section 253) provided: "A judge of the juvenile court may, on his own motion made within 20 judicial days of the hearing before the referee, order a rehearing of any matter heard before a referee."

2. Former section 560 (presently section 254) of the same Code provided: "All rehearings of matters heard before a referee shall be before a judge of the juvenile court and shall be conducted de novo."

STATEMENT OF THE CASE

On March 19, 1976, a petition pursuant to Welfare and Institutions Code section 602[1] was filed in the San Mateo County Juvenile Court, alleging that respondent Jesse W. had committed battery, in violation of Penal Code section 242. On April 9, 1976, the matter was heard before Referee Zerne Haning, who dismissed the petition on the ground that there was reasonable doubt that respondent had committed the act alleged in the petition. On April 12, the San Mateo County District Attorney requested the juvenile court to grant a rehearing on its own motion pursuant to former Welfare and Institutions Code section 559. On April 15, the court granted a rehearing, which was set for June 21, 1976. On June 16, respondent petitioned to the California Court of Appeal for a writ of prohibition (see Cal. Code Civ. Proc. § 1102) to restrain the juvenile court from holding the rehearing. The Court of Appeal denied relief on November 5, 1976. 133 Cal.Rptr. 870.

The Supreme Court of California granted a hearing on December 29, 1976, and granted the requested relief on March 31, 1978. 20 Cal.3d 893, 576 P.2d 963, 145 Cal.Rptr. 1. The opinion was modified and the judgment became final on May 30, 1978. 21 Cal.3d 512b, ... P.2d ....., ... Cal.Rptr. .....

---

[1]Section 602 provides in pertinent part: "Any person who is under the age of 18 years when he violates any law of this state or of the United States . . . is within the jurisdiction of the juvenile court. . . ."

REASONS FOR GRANTING THE WRIT

The California Supreme Court has held that California's juvenile court is forbidden by the Double Jeopardy Clause of the Fifth Amendment, made applicable to the states by force of the Due Process Clause of the Fourteenth Amendment, to review a determination by a referee of the juvenile court that the allegations of a delinquency petition were not proved beyond a reasonable doubt. In *Swisher v. Brady*, 46 U.S.L.W. 4880 (6-28-78), this Court held that the values protected by the Double Jeopardy Clause are not offended by a juvenile court judge's reconsideration of a master's findings that a juvenile had not committed acts which constitute delinquency under state law. The California Supreme Court's opinion in this case represents a misinterpretation of the Double Jeopardy Clause which would prevent California from using referees to meet the heavy burden of juvenile court caseloads. To the extent that the California Supreme Court held that the juvenile court may not review the record made before the referee and, on the basis of that record, reject that official's findings, it must be reversed.

ARGUMENT

THE CALIFORNIA SUPREME COURT ERRED IN HOLDING THAT A JUVENILE COURT JUDGE MAY NOT RECONSIDER THE DETERMINATION OF A REFEREE THAT A JUVENILE DID NOT COMMIT A DELINQUENT ACT.

In its opinion below, the California Supreme Court held that the Double Jeopardy Clause of the Fifth

Amendment to the United States Constitution is violated by a hearing before a juvenile court judge after a referee has dismissed for lack of sufficient evidence a petition filed pursuant to Welfare and Institutions Code section 602. The court reasoned that jeopardy attached when a hearing is held before a referee (20 Cal.3d at 896, 576 P.2d at 965, 145 Cal.Rptr. at 3), that a rehearing before a juvenile court judge is a separate independent proceeding (*id.* at 898, 576 P.2d at 966, 145 Cal.Rptr. at 4) which would be a second prosecution (*id.* at 898, 576 P.2d at 966, 145 Cal. Rptr. at 4), and that this subsequent proceeding would constitute double jeopardy (*id.* at 899, 576 P.2d at 966, 145 Cal.Rptr. 4). Since a referee in California may perform only subordinate judicial duties and thus cannot bind litigants with his factual and legal resolutions (Cal. Const. art IX, § 22; *In re Edgar M.*, 14 Cal.3d 727, 734-35, 537 P.2d 406, 411-12, 122 Cal. Rptr. 574, 579-80 [1975]), it necessarily follows that the effect of this decision is to prohibit referee jurisdictional hearings (20 Cal.3d at 900, 576 P.2d at 967, 145 Cal.Rptr. at 5 [concurring opn.]).

In *Swisher v. Brady,* 46 U.S.L.W. 4880 (1978), this Court held constitutional a Maryland Rule of Procedure which permitted a juvenile court judge to reconsider and overrule the findings of a master. We submit that, for the reasons stated in *Swisher*, the California Supreme Court erred in holding that a juvenile court judge may not review the finding of a referee that evidence of the delinquency of the respondent was insufficient.

Rule 911 of the Maryland Rules of Procedure provided that the findings, conclusions, recommendations, and orders of a master were "proposed" rather than final. 46 U.S.L.W. at 4881. After an unfavorable proposal by a master, Rule 911 permitted the state to file exceptions, "but the judge can act on them only on the basis of the record made before the master and 'such additional, [relevant] evidence . . . to which the parties raise no objection.'" *Id.* (fn. omitted). The juvenile court judge has the power to accept, reject, or modify the master's proposals on the basis of the record before him. *Id.*

This Court held that the foregoing procedure did not violate the Double Jeopardy Clause. Rather, "Maryland has created a system with Rule 911 in which an accused juvenile is subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge." *Id.* at 4883. This Court then identified three purposes of the Double Jeopardy Clause and explained why Rule 911 did not impinge upon any of them.

First, the prohibition against double jeopardy was intended to prevent the prosecution from presenting at a second proceeding any evidence which it failed to muster at the first hearing. *Id.*; *Burks v. United States*, 46 U.S.L.W. 4632, 4634 (1978). Rule 911 provided that the juvenile court could not consider new evidence not presented before the master unless the minor did not object.

Second, the presentation of evidence before a series of factfinders increases the likelihood that an innocent

defendant may be convicted. 46 U.S.L.W. at 4883; *Arizona v. Washington*, 46 U.S.L.W. 4127, 4129 (1978). In Maryland, however, the power to make factual and legal resolutions binding upon the minor and state was not granted to the master. The juvenile court judge, and only the judge, had been designated as factfinder and adjudicator.

Third, the Double Jeopardy Clause was intended to protect the defendant from the embarrassment, expense and ordeal of a second trial. 46 U.S.L.W. at 4883; *Green v. United States,* 355 U.S. 184 (1957). This Court drew a distinction between a "full-blown second trial" and a juvenile court's "hearing on the record," which it analogized to post-trial briefing and argument.

Petitioner submits that *Swisher* stands for the proposition that a juvenile court judge, under certain circumstances, may reject a finding of a subordinate official that a juvenile had not committed a delinquent act. The California Supreme Court held that under *no* circumstances may a juvenile court judge reconsider a referee's finding of insufficient evidence. To that extent the lower court clearly erred and its judgment must be reversed.

It may be argued in respondent's behalf that the California procedure is qualitatively different from that employed in Maryland because the proceeding before the juvenile court is not a review of the referee's findings. "Here the juvenile court does not purport to act in review of a recommended determination. It has ordered a de novo *rehearing* pur-

suant to sections 559 and 560. A rehearing de novo 'is in no sense a review of the hearing previously held, but is a complete trial of the controversy, the same as if no previous hearing had ever been held.' " 20 Cal.3d at 898, 576 P.2d at 966, 145 Cal.Rptr. at 4 (citation omitted).

According to the California Supreme Court's interpretation of state law, the respondent would be subjected to the "embarrassment, expense and ordeal" of a second trial in a rehearing is permitted. The third policy underlying the Double Jeopardy Clause, identified in *Swisher,* would be violated. 46 U.S.L.W. at 4883. Additionally, a de novo hearing would allow the state to offer additional evidence of guilt, thereby running afoul of the first purpose of the prohibition against double jeopardy discussed in *Swisher. Id.*

The simple answer to this position is that former section 560 (now section 254) is constitutionally repugnant and cannot stand in light of *Burks v. United States, supra,* but section 559 (now section 253) is not facially invalid and may be harmonized with the three *Swisher* criteria.[2] First, section 559 may be read to permit the juvenile court judge to consider only that evidence which was presented to the referee. The state would not have the forbidden "second crack" at the minor.

Second, the minor would appear before only one factfinder and adjudicator, for the California Constitution grants only subordinate judicial duties (art.

[2]The invalidity of section 560 does not "infect" section 559, which may stand alone. Cal. Welf. & Inst. Code § 18.

IX, § 22) to referees, who may not make a final disposition of any matter before them. *In re Edgar M., supra,* 14 Cal.3d at 134-35, 537 P.2d at 411-12, 122 Cal.Rptr. at 579-80. Thus, in terms of their powers and duties, the California referee and the Maryland master are functional equivalents.

Third, this Court has held that a juvenile court's review of the evidence presented before the master is not a "full-blown second trial" within the meaning of the Double Jeopardy Clause. 46 U.S.L.W. at 4883. If section 559 is construed to permit a juvenile court judge to review only that evidence on the record made before the referee, the subsequent proceeding would not be the second trial condemned by the Double Jeopardy Clause.

We recognize that this Court cannot normally construe a state statute to save its validity, but it can remand this case to the California Supreme Court to reconsider section 559 in light of the supervening development of federal constitutional law. *See, e.g., Dorchy v. Kansas,* 264 U.S. 286 (1924). Such a disposition would give to the state court the opportunity to interpret section 559 so as to effectuate "the desire of the State to continue using [referees] to meet the heavy burden of juvenile court caseloads while at the same time assuring that their use not violate the constitutional guarantee against double jeopardy." *Swisher v. Brady,* 46 U.S.L.W. at 4882.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: August 14, 1978.

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(Appendices Follow)

Appendices

Appendix A

In the Supreme Court of the State of California

S.F. No. 23580

Jesse W., a Minor,
Petitioner,
vs.
The Superior Court of San Mateo County,
Respondent;
The People,
Real Party in Interest.

[Filed Mar. 31, 1978]

OPINION

Jesse W., a minor, seeks writ of prohibition to restrain the respondent juvenile court from proceeding pursuant to statute (Welf. & Inst. Code, former § 559, now § 253) to redetermine petitioner's status as a ward after a referee had absolved petitioner of misconduct charged in a petition filed pursuant to Welfare and Institutions Code section 602. Welfare and Institutions Code section 602 provides: "Any person who is under the age of 18 years when he violates any law of this state . . . defining crime . . . is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court." All section references hereinafter are to the Welfare and Institutions Code unless otherwise specified.

Petitioner contends that the statutory procedure for redetermination of his status constitutes a second exposure to jeopardy for the same offense, contrary to [Fifth Amendment prohibitions.]* We agree and order the writ to issue.

Petitioner was charged pursuant to section 602 with having committed in December 1975 a battery as defined by Penal Code section 242. At a hearing before a juvenile court referee to determine the truth of such allegations, both the People and petitioner called witnesses who were examined and cross-examined. After brief argument the referee dismissed the charges on the ground that he entertained a reasonable doubt whether petitioner had committed the charged offense.

In April 1976, following the referee's order dismissing the petition, a juvenile court judge, acting pursuant to sections 559 and 560,[1] ordered a de novo rehearing of the allegations of petitioner's misconduct.

Petitioner moved to dismiss the charges on the ground that he had been once in jeopardy and, after the motion was denied, sought the instant relief. Proceedings in the juvenile court have been stayed pending the result of this proceeding.

---

*Brackets indicate the modifications made in the opinion on May 30, 1978.

[1]At the time here pertinent, section 559 provided: "A judge of the juvenile court may, on his own motion, order a rehearing of any matter heard before a referee." Section 559 has been repealed (Stats. 1976, ch. 1068, § 16), and section 253 now provides for a rehearing on the court's own motion.

At the time here pertinent section 560 (repealed, Stats. 1976, ch. 1068, § 16) provided: "All rehearings of matters heard before a referee shall be before a judge of the juvenile court and shall be conducted de novo." (See, currently, § 254.)

In support of his claim that a de novo rehearing before a juvenile court judge would expose him a second time to jeopardy, petitioner relies particularly on Breed v. Jones (1975) 421 U.S. 519. Pursuant to provisions of our Juvenile Court Law at issue in that case, a minor who had been found by a juvenile court to have committed alleged acts of misconduct and thus to have come within the jurisdiction of that court, could nevertheless be tried on criminal charges arising out of the same misconduct. The minor in *Breed* was criminally convicted after the juvenile court had adjudged him to be a ward who was unfit for treatment within the facilities of that court. (See Bryan v. Superior Court (1972) 7 Cal.3d 575.) The Supreme Court held that jeopardy first attached at the adjudicatory or jurisdictional hearing in the juvenile court, remarking that "it is simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years." (Breed v. Jones, *supra,* 421 U.S. 519, 529, fn. omitted.) The court next held that the jeopardy to which the juvenile was exposed in criminal court proceedings was a new and different jeopardy, and that the criminal conviction was thus obtained contrary to the constitutional prohibition.

It is thus established that double jeopardy prohibitions apply in juvenile proceedings. (See also Richard M. v. Superior Court (1971) 4 Cal.3d 370.) Jeopardy

attached in petitioner's case when the jurisdictional hearing was "entered upon." *(Id.,* at p. 376.) A conclusion that jeopardy has attached, however, "begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." (Serfass v. United States (1975) 420 U.S. 377, 390.) The dispute in this case concerns the proper characterization of juvenile court proceedings had after the point in time at which jeopardy first attached. We accordingly proceed to examine the nature of such proceedings.

We had occasion to examine a juvenile court referee's function and authority in In re Edgar M. (1975) 14 Cal.3d 727. We held that a referee is constitutionally limited to the performance of only "subordinate judicial duties" (see Cal. Const., art. VI, § 22) and noted that "referee's determinations . . . are not binding until adopted by the court itself." *(Id.,* at p. 734.) Although a referee may be assigned by a presiding juvenile court judge to hear and determine issues (former § 554, now § 248), such determinations are subject to procedures for review by a judge. "It is clear that without the availability of any review procedures the contested adjudication and disposition of a minor as a ward of the juvenile court by a referee acting without the parties' consent would violate the constitutional limitation upon his functions to 'subordinate judicial duties' (art. VI, § 22)." *(Id.,* at p. 735.)

In view of the foregoing it is manifest we have limited a referee's subordinate judicial duties in such a way that, unless a minor waives his right to judicial

redeterminations, a referee's findings and orders are advisory only.[2] A referee's findings or orders may appear to have the effect of a judicial determination when a minor's application for rehearing is denied by the juvenile court. But this is so only because the court, exercising an independent judgment, approves the referee's advisory determinations. (See former § 558, now § 252.) We stated in *Edgar M.* that "[A] judge's decision to deny the applicationu and hence adopt the referee's determinations as those of the court is based on data amply sufficient for forming a judgment independent from that of the referee. Under these circumstances the referee's initial findings and orders become only advisory and their rendition constitutes no more than a subordinate judicial duty." (In re Edgar M., *supra,* 14 Cal.3d 727, 735-736.)

The People contend that because a referee's function is merely to advise and assist the juvenile court in making judicial determinations affecting a minor, it cannot be said that a minor's exposure to jeopardy in proceedings before the referee constitutes an exposure separate and apart from that occurring when the juvenile court finally adjudicates the matter within the meaning of Breed v. Jones, *supra,* 421 U.S. 519, This contention has merit when in fact the juvenile court acts in review of advisory determinations made by a referee. In such instance there is but one con-

[2]We consider here only those instances in which the parties have not stipulated that a referee may make judicial determinations when otherwise qualified to do so. (See Cal. Const., art VI, § 21; In re Edgar M., *supra,* 14 Cal.3d 727, 732.) When a minor as a party litigant has so stipulated, a referee's determinations would then be accorded full judicial effect.

tinuing proceeding leading to but a single adjudication. But this is not the instant case. Here the juvenile court does not purport to act in review of a recommended determination. It has ordered a de novo *rehearing* pursuant to sections 559 and 560. A rehearing de novo "is in no sense a review of the hearing previously held, but is a complete trial of the controversy, the same as if no previous hearing had ever been held." (Collier & Wallis, Ltd. v. Astor (1937) 9 Cal.2d 202, 205.) The question thus becomes whether there is a second exposure to jeopardy *after* an initial exposure in proceedings before the referee, the referee's determinations are abandoned rather than reviewed, and another, independent proceeding is commenced before a juvenile court judge.

The Supreme Court emphasizes in *Breed* that the constitutional prohibition against a second exposure to jeopardy is a prohibition against multiple trials—not the threat of multiple punishment.[3] In that case a juvenile prosecution was deemed to be the equivalent of a criminal prosecution within the meaning of "jeopardy" and, after the juvenile proceedings had been prosecuted to a conclusion, there was a criminal prosecution for the same offense. Here juvenile proceedings before a referee have been prosecuted to a

[3]The statutory proceedings in the circumstances of the instant case do not pose a threat that a juvenile will be punished twice—once as the result of a referee's determination and again as the result of a juvenile court determination. The lack of such a threat, however, does not answer the constitutional claim. The court in *Breed* stated it has "pointed out that 'the Double Jeopardy Clause . . . is written in terms of potential risk of trial and conviction, not punishment.' (Price v. Georgia, 398 U.S., at 329. . . .)' (Breed v. Jones, *supra*, 421 U.S. 519, 532.)

conclusion and petitioner is threatened with a second prosecution for the same offense. Although the threatened prosecution is for a juvenile adjudication—not a criminal proceeding—"there is little to distinguish an adjudicatory Hearing . . . from a traditional criminal prosecution." (Breed v. Jones, *supra,* 421 U.S. 519, 530.) Moreover, we held a second exposure to jeopardy to exist when, after allegations of a first petition were found to be not true, a juvenile is charged with the same offense in a second petition. (Richard M. v. Superior Court, *supra,* 4 Cal.3d 370; see also In re James M. (1973) 9 Cal.3d 517, 520.)

We can distinguish *Richard M.* and *James M.* only on the ground that the first exposure to jeopardy in those cases occurred in hearings before a juvenile court judge, rather than before a referee as in the instant case. But because jeopardy attaches when proceedings are entered upon before either a juvenile court judge or a referee, the distinction is one which must be deemed to be without meaning. In both instances the juvenile is exposed to jeopardy when the hearing is entered upon. If that hearing is terminated and the juvenile is subjected again to a de novo hearing—not a review of the first hearing and determinations therein—he would necessarily be exposed to jeopardy a second time [within the meaning of Breed v. Jones, *supra,* 421 U.S. 519][4] See Aldrige v. Dean

[4]The constitutional prohibition against a second exposure to jeopardy is operative because of the prior *exposure.* Although the allegations of the petition were found to be not true in the prior proceedings before the referee, such a finding is not a condition to the right to invoke the constitutional prohibition.

(1975) 395 F.Supp. 1161 [holding procedures under Maryland's juvenile court law, substantively similar to pertinent provisions of our law, to expose a juvenile to a second jeopardy].)

We conclude petitioner would be exposed to jeopardy a second time [contrary to Fifth Amendment prohibitions] if subjected to a redetermination of his status as a ward of the juvenile court in the circumstances of this case.

Let a peremptory writ of prohibition issue as prayed for.[5]

Clark, J.

We Concur:
Mosk, J.
Richardson, J.
Manuel, J.

CONCURRING OPINION BY THOMPSON (Homer B.), J.*

I concur in the decision rendered, and respectfully conclude that its effect upon the juvenile court system warrants additional elaboration.

[5][Because a referee's determination favorable to a juvenile cannot be reheard, it is not merely a subordinate judicial act and is constitutionally proscribed. (See In re Edgar M., *supra*, 14 Cal. 3d 727.) While neither that constitutional proscription nor jeopardy limitations would foreclose referee jurisdictional recommendations adverse to a juvenile and subject to petition for rehearing by the juvenile, it is nevertheless apparent a referee's usefulness in hearing the jurisdictional issue will be severly limited. We do not purport to define those limits. However, juvenile court referees may continue to hear and to make advisory recommendations as to detention, fitness, dispositional and perhaps other matters without offending constitutional limitations.]

*Assigned by the Chairperson of the Judicial Council.

We are confronted with a single question: Whether a rehearing, granted by a juvenile court judge on the judge's own motion, of a determination by a referee that a juvenile had not committed the criminal offense charged in a petition, constituted a violation of the constitutional prohibition against double jeopardy.

I agree that the constitutional prohibition against double jeopardy is here violated; a determination which I find consistent with considerations of basic fairness.

This conclusion is reached with reluctance. Our decision will have a substantial impact upon the juvenile court system. Recently this court went to considerable length to preserve referee adjudication against a different kind of constitutional attack. (In re Edgar M. (1975) 14 Cal.3d 727 (122 Cal. Rptr. 574).) By authority of that case (*Id.*, at p. 734), juvenile referees are constitutionally limited to the performance of only "subordinate judicial duties." (Cal. Const., art. VI, § 22.) Since referee jurisdictional determinations are hereunder held no longer subject to rehearing, under the double jeopardy prohibition, such referee decisions become final adjudications and their rendition fails to meet the test of "subordinate judicial duties" laid down as a constitutional requirement in *Edgar M.* They become determinative; hence invalid under *Edgar M.* Thus, the effect of this decision is to hereafter prohibit referee jurisdictional hearings.

In the case at bar we are dealing with what is termed a referee jurisdictional or adjudicative hearing; in familiar language, a trial, hence the double

jeopardy issue. The effect of this holding upon non-jurisdictional referee determinations (for example, detention hearings, fitness hearings, and annual reviews) is left to subsequent determination by this court.

Returning to the question presented, let us: (1) examine the nature and scope of double jeopardy protection; (2) consider its application to the juvenile court system; and (3) review other considerations of basic fairness.

DOUBLE JEOPARDY PROTECTION

Blackstone recorded: ". . . no man is to be brought into jeopardy of his life more than once for the same offence." (4 Blackstone's Commentaries 335.) Early on, the Supreme Court observed that the ". . . common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted." (Ex parte Lange (1874) 18 Wall. 163, 169; and see U.S. v. Ball (1896) 163 U.S. 662, 669; Kepner v. U.S. (1905) 195 U.S. 100, 130; Price v. Georgia (1970) 398 U.S. 323, 326.)

The basic rationale, one firmly embedded in our jurisprudence, is that the State with all of its power and resources should not be permitted to make repeated attempts to convict a person for an alleged offense, thereby ". . . subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." (Green v. U.S. (1957) 355 U.S. 184, 187; see also, 1 Wharton 299, 301.)

Double jeopardy is expressly prohibited by the federal Constitution and the California Constitution. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15.) The double jeopardy provision of the Fifth Amendment applies to the states through the Fourteenth Amendment. (Benton v. Maryland (1969) 395 U.S. 784; see also, Simpson v. Florida (1971) 403 U.S. 384.)

APPLIED TO THE JUVENILE COURT

In Richard M. v. Superior Court (1971) 4 Cal. 3d 370, at page 375, (93 Cal. Rptr. 752), this court, by unanimous decision, held that in proceedings before the juvenile court ". . . juveniles are entitled to constitutional protections against twice being placed in jeopardy for the same offense." There the allegations of a petition were found not true and the petition dismissed, only to be followed by the filing of a new petition for the same offense, a procedure held violative of the constitutional prohibition. (See also, In re James M. (1973) 9 Cal. 3d 517, 520 (108 Cal. Rptr. 89).)

Juvenile jurisdictional hearings are non-jury trials. In non-jury trials jeopardy attaches upon the swearing of the first witness. (Richard M. v. Superior Court, *supra*, 4 Cal. 3d 370, 376 (93 Cal. Rptr. 752); People v. Sturdy (1965) 235 Cal. App. 2d 306, 314 (45 Cal. Rptr. 203); see also, Breed v. Jones (1974) 421 U.S. 519, 531.)

Since this constitutional protection applies to juvenile court proceedings, and since jeopardy attached upon commencement of the referee hearing, resolution of the question presented depends upon whether the rehearing granted by the judge constituted a new or second jeopardy. Petitioner asserts that under the authority of the *Breed* case, a rehearing would expose petitioner to double jeopardy. *(Id.) Breed* involved two trials for the same offense, hence double jeopardy. (See also, Aldridge v. Dean (1975) 395 F. Supp. 1161.)

Certainly procedurally, the case before us also involves two separate and distinct trials, one before the referee, the second before a judge. To illustrate, if one were to observe a referee trial in progress, then subsequently observe a judge trial in progress, it would be difficult to tell them apart. Barring individual idiosyncrasies of the hearing officers, both trials are commenced and conducted according to identical procedures.

The juvenile court law provides: "A referee shall hear such cases as are assigned to him by the presiding judge of the juvenile court, with the same powers as a judge of the juvenile court." (W. & I. Code, former § 554, now § 248.) The new juvenile court rules adopted by the Judicial Council, effective July 1, 1977, make special provision, as to referees, regarding the use of court reporters and advising participants that referee orders may be reheard by a judge. (Calif. Rules of Court, Rule 1317.) However, in all other respects the rule provides ". . . proceed-

ings heard by a referee shall be conducted in the same manner as juvenile court proceedings heard by a judge." *(Id.)* Although certain dispositional orders by a referee require express approval by a judge, the referee has available the same range of dispositional orders as are available to a judge. *(Id.*, Rule 1318.) It is interesting to note that the adjudicative hearing in juvenile court in the *Breed* case was actually conducted by a referee rather than a judge.

In the instant case, the referee commenced the jurisdictional hearing, both the people and the juvenile called witnesses who were examined and cross-examined, and after argument the petition was dismissed. As in *Breed*, the referee hearing was, in a true sense, a trial.

Let us next consider the nature of the rehearing ordered by the judge in the case before us. Is such a rehearing a trial? The juvenile court law provides: "All rehearings of matters heard before a referee shall be before a judge of the juvenile court and shall be conducted de novo." (W. & I. Code, former § 560, now § 254; Calif. Rules of Court, Rule 1319(e).) What is a hearing "de novo"? As this court has observed, it ". . . literally means a new hearing, or a hearing the second time. (cite omitted) Such a hearing contemplates an entire trial of the controversial matter in the same manner in which the same was originally heard. *It is in no sense a review of the hearing previously held, but is a complete trial of the controversy,* the same as if no previous hearing had even been held." (emphasis added, Collier &

Wallis, Ltd. v. Astor (1937) 9 Cal. 2d 202, 205; Buchwald v. Katz (1972) 8 Cal. 3d 493, 502 (105 Cal. Rptr. 368).)

Thus, a rehearing in the juvenile court is a retrial, a second trial. It is therefore clear that the case before this court, as was true in *Breed*, consists of two separate, distinct trials for the same offense, elements classically associated with double jeopardy.

Let us next examine the attempt by the people to distinguish *Breed*. First, the people describe the proceedings in the instant case as differing from *Breed* in that here they were "ongoing"; the referee making findings and orders "preliminary in nature", "advisory determinations", which are subject to "independent judicial resolution".

Are these assertions borne out by the facts presented in the case before us? Certainly the juvenile proceedings in this case were not "on going". The referee dismissed the petition. There is no provision in the statute or rules of court for application for rehearing by the people. (W. & I. Code, formerly §§ 553-560, now §§ 247-254; Calif. Rules of Court, Rules 1316-1319.) When, as in this case, a referee dismisses a petition, that concludes the matter. Neither the statute nor rules provide for any type of review. If such adjudicative determination is ever reviewed by a juvenile court judge, such review is a matter of purely local and discretionary practice. The fact that the judge in this case ordered a rehearing on his own motion (W. & I. Code, former § 559, now § 253; Calif. Rules of Court, Rule 1319(d)) was due to circumstances peculiar to this case and no part of a regular or "ongoing" procedure for review. In fact, the letter from the District Attorney to the judge precipitating the order for rehearing in this case was action which has been criticized by this court and conduct which we have stated to be of "doubtful constitutionality". (Donald L. v. Superior Court (1972) 7 Cal. 3d 592, 598-599 (102 Cal. Rptr. 850).)

It is also evident from the facts that the referee's determination was not "preliminary in nature" or "advisory". Rather, it was determinative of the first trial. The fact that the rehearing by the judge is a hearing "de novo" (i.e., a new trial and not a review), as demonstrated in the earlier discussion, contradicts the assertion that the referee's order was "preliminary" or "advisory". Had rehearing not been granted, the matter would have stood concluded. It is true that the judge does, upon conducting a hearing "de novo", make an "independent judicial resolution" of the matter. However, that follows from the fact that the rehearing by the judge is a second and separate trial.

Secondly, the people describe the proceedings in the instant case as differing from *Breed* in that the transition from a referee to a judge in the juvenile court does not impose the same "harsh" burden as that imposed in a transfer from juvenile to criminal court. In this regard, it should be noted that a trial in criminal court has its compensations. It carries the right to trial by jury and the right to bail in most cases. Furthermore, a trial is a trial—the constitu-

tional doctrine of double jeopardy does not distinguish between juvenile and criminal trials. To a juvenile *acquitted* by a referee, a second exposure to jeopardy before a judge of the juvenile court may seem every bit as onerous as a trial in criminal court after a *conviction* in juvenile court before a referee.

The people, by repeated referrals to "on-going" juvenile proceedings and single jeopardy, seem to be relying upon a "continuing jeopardy" or "run their full course" concept. However, these arguments were advanced and rejected in *Breed.* (*Id.,* at p. 534; see also, *United States v. Jenkins,* (1975) 420 U.S. 358, 369.)

Lastly, it should be noted that *In re Edgar M.* (1975) 14 Cal. 3d 727 (122 Cal. Rptr. 574), and the instant case involve separate and distinct constitutional provisions. Resolving the double jeopardy issue by prohibiting a rehearing "de novo" merely shifts the constitutional violation to the *Edgar M.* limitation. Thus, in the case before us the referee conducted an adjudicative hearing, found for the juvenile, and dismissed the petition. Whether such action meets the *Edgar M.* test depends upon whether such action was determinative. Since the judge could, prior to the instant decision, on the judge's own motion set aside the referee decision and conduct a hearing "de novo", the constitutional requirements of *Edgar M.* were met.

However, since the hearing "de novo" before the judge constitutes a second trial for the same offense charged in the referee determination, the retrial results in double jeopardy. Elimination of rehearings "de novo" in order to meet the double jeopardy violation makes referee hearings determinative and hence violative of the *Edgar M.* rule.

BASIC FAIRNESS

The conclusion here reached is consistent with considerations of fair play. Assume that a juvenile is brought before a referee for an adjudicative hearing. Should the juvenile testify? If the juvenile does not testify, he may be found to have committed the offense. If he does testify, and a rehearing is granted, as in this case, he has revealed his defense strategy; a revelation that may well be used against him in a subsequent trial before a judge.

Consider a further problem. Should the juvenile in a referee hearing call all defense witnesses? If the juvenile does call all his witnesses and a rehearing is granted, then the people are prepared to meet the full defense before the judge. If the juvenile holds back, is found to have committed the offense, and the judge does not grant a rehearing, then the juvenile has lost the chance to present that portion of the defense. At the very least, the juvenile reveals the thrust of his defense at the referee hearing.

It has been asserted that the referee system actually permits prosecutorial discovery, which is not otherwise available under normal discovery procedures. There are no specific statutory discovery provisions provided for the juvenile court. In this sense, a referee hearing may be to the People what a preliminary

hearing is to the defense in criminal court. Although the new juvenile court rules do provide discovery procdures which attempt to reflect statutory and judicially developed rules of criminal discovery in the adult court, prosecutorial discovery is limited in the juvenile court in the same way it is limited in adult court. (Calif. Rules of Court, Rule 1341.)

Lastly, it seems apparent that the more trials for the same offense, the greater the likelihood that a conviction of an innocent accused will be achieved.

For all these reasons, I concur that the constitutional prohibition against double jeopardy is here violated, a conclusion consistent with considerations of basic fairness. The writ of prohibition should be issued.

Thompson (Homer B.), J.*

We Concur:
Bird, C.J.
Tobriner, J.

*Assigned by the Chairperson of the Judicial Council.

Appendix B

(CERTIFIED FOR PUBLICATION)

In the Court of Appeal
of the
State of California

First Appellate District

Division One

1 Civil 39301

Jesse Lionel W., Jr., a Minor,
Petitioner,
vs.
The Superior Court of San Mateo County,
Respondent;
The People,
Real Party in
Interest.

[Filed Nov. 5, 1976]

OPINION

Jessie W. was charged in the juvenile court, according to Welfare and Institutions Code (hereafter

statutory citations will be to that code) section 602,* with committing an act which, if committed by an adult, would constitute the misdemeanor offense of battery. A juvenile court referee, who was not acting on "stipulation of the parties litigant" (see Cal. Const., art. VI, § 21; In re Edgar M. (1975) 14 Cal. 3d 727, 732), conducted a hearing to determine whether the minor came within the jurisdiction, and was therefore subject to the available sanctions, of the juvenile court. Finding the evidence not convincing beyond a reasonable doubt, the referee dismissed the petition. The judge of the juvenile court thereafter, on his own motion, timely ordered a rehearing of the matter, as permitted by section 559.

Thereafter Jesse W. applied to this court for a writ of prohibition to prevent the rehearing. His contention was that the proceedings before the referee had placed him in jeopardy, and that a rehearing by the juvenile court judge would constitute double jeopardy, contrary to the Fifth Amendment and the state's Constitution, article I, section 15.

The appellate courts of this state have several times held that in such a context, the double jeopardy rule does not apply. (See In re Bradley (1968) 258

*Section 602 provides:

"Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime or who, after having been found by the juvenile court to be a person described by section 601, fails to obey any lawful order of the juvenile court, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

Cal.App.2d 253, 260-261 [hearing by S.Ct. denied; disapproved as to unrelated issue in Richard M. v. Superior Court (1971) 4 Cal.3d 370, 375-376]; In re Henley (1970) 9 Cal.App.3d 924, 929-931; In re Dale S. (1970) 10 Cal.App.3d 952, 956 [hearing by S.Ct. denied]; see also People v. J.A.M. (1971) 483 P.2d 362, 364; contra, Aldridge v. Dean (1975) 395 F.Supp. 1161, 1172.) But we nevertheless issued the alternative writ of prohibition as requested by Jesse W., in order to determine the effect on California's rule, of the recent decision of the United States Supreme Court, entitled *Breed v. Jones* (1975) 421 U.S. 519.

In *Breed v. Jones,* a California juvenile court judge or referee (it is not clear which) had found the allegation of a section 602 petition to be true, and that Jones, the juvenile, had committed the act there charged. Thereafter, upon a hearing "on the question of the proper disposition to be made of the minor" (see § 702), the judge of the court concluded that Jones was "unfit for treatment as a juvenile," and ordered that he be prosecuted for the charged act "as an adult" in the superior court (see § 707). Without success Jones repeatedly contended in the state's courts that the superior court trial would subject him to double jeopardy, contrary to the pertinent state and federal constitutional provisions. On certiorari, the *Breed v. Jones* court stated: "We hold that the prosecution of [Jones] in Superior Court, after an adjudicatory proceeding in Juvenile Court, violated the Double Jeopardy Clause of the Fifth

Amendment, as applied to the States through the Fourteenth Amendment." (421 U.S., p. 541.)

The question before us in the instant proceeding is whether the juvenile court referee's negative finding on the issue of Jesse W.'s wrongdoing and his "dismissal" of the section 602 petition, was the *adjudication* of the proceeding which had been commenced against him. If it was, then according to *Breed v. Jones,* the grant of a rehearing by the judge of the juvenile court had the effect, as contended by Jesse W., of exposing him to double jeopardy.

It becomes important to consider the function and authority of the referee, frequently appointed by juvenile courts to assist in the performance of the court's duties.

California's Constitution, article VI, section 22, provides: "The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform *subordinate judicial duties.*" (Emphasis added.)

This section acts as a "limitation on the powers of juvenile court referees"; and the referee is constitutionally restricted to the performance of " 'subordinate judicial duties.' " (In re Edgar M., supra, 14 Cal.3d 727, 729, 732.)

Such a referee's determinations "are not binding until adopted by the court itself," and "the referee's initial findings and orders become only advisory and their rendition constitutes no more than a subordinate judicial duty." (In re Edgar M., supra, 14 Cal.3d

727, 734, 736.) His functions may be likened to those of the traditional master in chancery, and: " 'It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented and devolve that duty upon any of its officers.' (*Kimberly v. Arms* (1889) 129 U.S. 512, 524 [32 L.Ed. 764, 768, 9 S.Ct. 355].)" (*Id.,* p. 734.)

The Juvenile Court Law provides for the reconsideration and review, and for the adoption or modification or rejection, by the judge of the juvenile court of *all* of the referee's findings and orders. The statute with which we are concerned in the case at bench is section 559, which provides: "A judge of the juvenile court may, on his own motion made within 20 judicial days of the hearing before a referee, order a rehearing of any matter heard before a referee." For similar and related provisions, see sections 554, 555, 556, 557, 558 and 560.

This statutory reservation of ultimate authority to the judge of the juvenile court is required by, and is a proper compliance with, the command of the state's Constitution, article VI, section 22. "The juvenile Court Law directs referees to hear cases assigned by the presiding juvenile court judge 'with the same powers as a judge of the juvenile court' (§ 554) but subjects the referee's findings and orders

resulting from such hearings to procedures for their review by a regular judge. It is clear that without the availability of any review procedures the contested adjudication and disposition of a minor as a ward of the juvenile court by a referee acting without the parties' consent would violate the constitutional limitation upon his functions to 'subordinate judicial duties' . . . ." (In re Edgar M., supra, 14 Cal.3d 727, 735.)

It will thus be seen that the referee's finding that Jesse W.'s charged wrongdoing had not been established beyond a reasonable doubt, and his order dismissing the section 602 petition were but advisory and provisional; the "adjudicatory proceeding" (see Breed v. Jones, supra, 421 U.S. 519, 541) continued, until adjudication by the judge of the juvenile court.

An accused person, including a minor in a juvenile court (see In re James M. (1973) 9 Cal.3d 517, 520), is placed in "jeopardy" within the meaning of the state and federal constitutional provisions when, on valid charges, he is placed on trial before a *competent tribunal with "jurisdiction" to adjudicate the issue of his guilt.* (Bunnell v. Superior Court (1975) 13 Cal.3d 592, 601; Richard M. v. Superior Court, supra, 4 Cal.3d 370, 376; Paulson v. Superior Court (1962) 58 Cal.2d 1, 5; Jackson v. Superior Court (1937) 10 Cal.2d 350, 352.) It is patent that in section 602 adjudicatory proceedings the competent tribunal with power to adjudicate the minor's "guilt" is the judge of the juvenile court, and not his "subordinate" judicial official, the referee.

Jesse W. was here placed on trial before the *juvenile court* on the issue created by the section 602 petition and his response thereto. The judge of that court alone, as indicated, had *jurisdiction* to adjudicate the issue; the referee, as pointed out by the state's Constitution, statutes and judicial decisional authority, did not.

Further analysis seems desirable. Within the meaning of the apposite constitutional provisions, in a juvenile court section 602 hearing the minor is placed in jeopardy at its commencement, ordinarily with the swearing of the first witness. (People v. Upshaw (1974) 13 Cal.3d 29, 32-33.) The hearing may be before a judge, or a referee, of the juvenile court. If for any reason the hearing is aborted without "legal necessity" therefor (see Curry v. Superior Court (1970) 2 Cal.3d 707, 713-714), then the minor has suffered "prior jeopardy." But the hearing will ordinarily continue before the judge or the referee to its intended conclusion. In such a case there is no "*prior*" jeopardy until the adjudicatory act of the juvenile court judge. This adjudication may be the express act of the judge, or it may follow from his passive election to allow the advisory findings and the provisional decision of the referee to stand. (See §§ 554-560.)

It follows that the juvenile court judge's continuing jurisdiction over the case, and his rehearing order following the referee's provisional finding and order of dismissal, did not expose Jesse W. to double jeopardy.

The holding of *Breed v. Jones,* supra, 421 U.S. 519, is found to be inapposite to the issue here at hand. Treating the hearing of that case as having been conducted by a referee, that official made no adjudication of, and was without jurisdiction to adjudicate, the issue of Jones' delinquency; the adjudication was thereafter made by the judge of the juvenile court. If the hearing was before the judge of the court, in that case also, it was he who made the adjudication. It was following the adjudication that the *Breed v. Jones* juvenile court judge remanded Jones to the superior court for another trial of the same issue, this time as an adult subject to criminal sanctions. The high court found jeopardy to have attached by virtue of the first adjudicatory proceeding, and the following criminal trial to have exposed the minor to double jeopardy. In the case at bench, as has been pointed out, there had been no *prior* adjudicatory proceeding before the juvenile court judge's rehearing order. Instead, that order was made in the course of the then pending proceedings against Jesse W.

We have considered the language of section 554, pointed out and relied upon by Jesse W.: "A referee shall hear such cases as are assigned to him by the presiding judge of the juvenile court, with the same powers as a judge of the juvenile court." This statute gives the referee the power of a judge of the juvenile court in *presiding* over the hearing. As we have pointed out, it may not be construed as equating his judicial decisional powers with those of the judge

for such a grant would be contrary to the limitation of the state's Constitution, article VI, section 22. "The Juvenile Court Law directs referees to hear cases assigned by the presiding juvenile court judge 'with the same powers as a judge of the juvenile court' (§ 554) but subjects the referee's findings and orders resulting from such hearings to procedures for their review by a regular judge." (In re Edgar M., supra, 14 Cal.3d 727, 735.)

The court in *In re Dale S.,* supra, 10 Cal.App.3d 952, 956, declared: "[E]very proceeding before a referee is subject to a rehearing and, a fortiori, every *order* of a referee is subject to being modified or vacated by an order of a juvenile court judge upon rehearing. It follows that if the referee's order does not become final, as in this case, because a rehearing is granted pursuant to section 558 or 559, the rehearing de novo does not place the minor in jeopardy a second time; the rehearing is a part of the original proceedings." We hold that this continues as a correct statement of the law of this state.

A contention of Jesse W. that the juvenile court judge did not "review all evidence on the record of the referee's hearing" is unsupported by any record furnished us. "In the absence of a record that reveals error, it must be presumed that there was no error." (People v. Goodloe (1964) 225 Cal.App.2d 686, 688-689.)

For these several reasons we have concluded that Jesse W. is not entitled to the relief he seeks.

The peremptory writ of prohibition is denied, and the alternative writ is discharged.

CERTIFIED FOR PUBLICATION

Elkington, J.

We Concur:

Molinari, P.J.

Sims, J.